Mass and Fake Comments in Agency Rulemaking

October 5, 2018

Selected Rulemaking Recommendations of the Administrative Conference of the United States (2011-2018)

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Administrative Conference Recommendation 2011-1

Legal Considerations in e-Rulemaking

Adopted June 16, 2011

Agencies are increasingly turning to e-Rulemaking to conduct and improve regulatory proceedings. "E-Rulemaking" has been defined as "the use of digital technologies in the development and implementation of regulations"[1] before or during the informal rulemaking process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA). It may include many types of activities, such as posting notices of proposed and final rulemakings, sharing supporting materials, accepting public comments, managing the rulemaking record in electronic dockets, and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.

A system that brings several of these activities together is operated by the eRulemaking program management office (PMO), which is housed at the Environmental Protection Agency and funded by contributions from partner Federal agencies. This program contains two components: Regulations.gov, which is a public website where members of the public can view and comment on regulatory proposals, and the Federal Docket Management System (FDMS), which includes FDMS.gov, a restricted-access website agency staff can use to manage their internal files and the publicly accessible content on Regulations.gov. According to the Office of Management and Budget, FDMS "provides . . . better internal docket management functionality and the ability to publicly post all relevant documents on regulations.gov (e.g., Federal Register documents, proposed rules, notices, supporting analyses, and public comments)."[2] Electronic docketing also provides significant costs savings to the Federal government, while enabling agencies to make

[1] Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process at 2 (2004) (working paper), http://lsr.nellco.org/upenn_wps/108.

[2] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FY 2009 REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE E-GOVERNMENT ACT OF 2002, at 10 (2009), http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/2009_egov_report.pdf.

proposed and final regulations, supplemental materials, and public comments widely available to the public. These incentives and the statutory prompt of the E-Government Act of 2002, which required agencies to post rules online, accept electronic comments on rules, and keep electronic rulemaking dockets,[3] have helped ensure that over 90% of agencies post regulatory material on Regulations.gov.[4]

Federal regulators, looking to embrace the benefits of e-Rulemaking, face uncertainty about how established legal requirements apply to the web. This uncertainty arises because the APA, enacted in 1946, still provides the basic framework for notice-and-comment rulemaking. While this framework has gone largely unchanged, the technological landscape has evolved dramatically.

The Conference has therefore examined some of the legal issues agencies face in e-Rulemaking and this recommendation provides guidance on these issues. The Conference has examined the following issues:

- *Processing large numbers of similar or identical comments.* The Conference has considered whether agencies have a legal obligation to ensure that a person reads every individual comment received, even when comment-processing software reports that multiple comments are identical or nearly identical.
- *Preventing the publication of inappropriate or protected information.* The Conference has considered whether agencies have a legal obligation to prevent the publication of certain types of information that may be included in comments submitted in e-Rulemaking.
- *Efficiently compiling and maintaining a complete rulemaking docket.* The Conference has considered issues related to the maintenance of rulemaking dockets

[3] *See* Pub. L. 107-347 § 206.

[4] Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies, p. D-1 (Nov. 30, 2010), http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf. Some agencies rely on their own electronic docketing systems, such as the Federal Trade Commission (which uses a system called CommentWorks) and the Federal Communications Commission, which has its own electronic comment filing system (http://fjallfoss.fcc.gov/ecfs/).

in electronic form, including whether an agency is obliged to retain paper copies of comments once they are scanned to electronic format and how an agency that maintains its comments files electronically should handle comments that cannot easily be reduced to electronic form, such as physical objects.

- *Preparing an electronic administrative record for judicial review*. The Conference has considered issues regarding the record on review in e-Rulemaking proceedings.

This recommendation seeks to provide all agencies, including those that do not participate in Regulations.gov, with guidance to navigate some of the issues they may face in e-Rulemaking.[5] With respect to the issues addressed in this recommendation, the APA contains sufficient flexibility to support e-Rulemaking and does not need to be amended for these purposes at the present time. Although the primary goal of this recommendation is to dispel some of the legal uncertainty agencies face in e-Rulemaking, where the Conference finds that a practice is not only legally defensible, but also sound policy, it recommends that agencies use it. It bears noting, however, that agencies may face other legal issues in e-Rulemaking, particularly when using wikis, blogs, or similar technological approaches to solicit public views, that are not addressed in this recommendation. Such issues, and other broad issues not addressed herein, are beyond the scope of this recommendation, but warrant further study.[6]

[5] This report follows up on previous work of the Administrative Conference. On October 19, 1995, Professor Henry H. Perritt, Jr. delivered a report entitled "Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication." Although never published, the Perritt Report continues to be a helpful resource and is available at: http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm.

[6] The Conference has a concurrent recommendation which focuses on issues relating to the comments phase of the notice-and-comment process independent of the innovations introduced by e-Rulemaking. *See* Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments.*

RECOMMENDATION

Considering Comments

1. Given the APA's flexibility, agencies should:

(a) Consider whether, in light of their comment volume, they could save substantial time and effort by using reliable comment analysis software to organize and review public comments.

(1) While 5 U.S.C. § 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.

(2) Agencies should also work together and with the eRulemaking program management office (PMO), to share experiences and best practices with regard to the use of such software.

(b) Work with the eRulemaking PMO and its interagency counterparts to explore providing a method, including for members of public, for flagging inappropriate or protected content, and for taking appropriate action thereon.

(c) Work with the eRulemaking PMO and its interagency counterparts to explore mechanisms to allow a commenter to indicate prior to or upon submittal that a comment filed on Regulations.gov contains confidential or trade secret information.

(d) Confirm they have procedures in place to review comments identified as containing confidential or trade secret information. Agencies should determine how such information should be handled, in accordance with applicable law.

Assessing Privacy Concerns

2. Agencies should assess whether the Federal Docket Management System (FDMS) System of Records Notice provides sufficient Privacy Act compliance for their uses of Regulations.gov. This could include working with the eRulemaking PMO to consider whether changes to the FDMS System of Records Notice are warranted.

Maintaining Rulemaking Dockets in Electronic Form

3. The APA provides agencies flexibility to use electronic records in lieu of paper records. Additionally, the National Archives and Records Administration has determined that agencies are

not otherwise legally required, at least under certain circumstances, to retain paper copies of comments properly scanned and included in an approved electronic recordkeeping system. The circumstances under which such destruction is permitted are governed by each agency's records schedules. Agencies should examine their record schedules and maintain electronic records in lieu of paper records as appropriate.

4. To facilitate the comment process, agencies should include in a publicly available electronic docket of a rulemaking proposal all studies and reports on which the proposal for rulemaking draws, as soon as practicable, except to the extent that they would be protected from disclosure in response to an appropriate Freedom of Information Act request.[7]

5. Agencies should include in the electronic docket a descriptive entry or photograph for all physical objects received during the comment period.

Providing Rulemaking Records to Courts for Judicial Review

6. In judicial actions involving review of agency regulations, agencies should work with parties and courts early in litigation to provide electronic copies of the rulemaking record in lieu of paper copies, particularly where the record is of substantial size. Courts should continue their efforts to embrace electronic filing and minimize requirements to file paper copies of rulemaking records. The Judicial Conference should consider steps to facilitate these efforts.

Complying with Recordkeeping Requirements in e-Rulemaking

7. In implementing their responsibilities under the Federal Records Act, agencies should ensure their records schedules include records generated during e-Rulemaking.

[7] *See also* Exec. Order No. 13,563, § 2(b), 76 Fed. Reg. 3,821 (Jan. 18, 2011) (requiring agencies to provide timely online access to "relevant scientific and technical findings" in the rulemaking docket on regulations.gov).

Administrative Conference Recommendation 2011-2

Rulemaking Comments

Adopted June 16, 2011

One of the primary innovations associated with the Administrative Procedure Act ("APA") was its implementation of a comment period in which agencies solicit the views of interested members of the public on proposed rules.[1] The procedure created by the APA has come to be called "notice-and-comment rulemaking," and comments have become an integral part of the overall rulemaking process.

In a December 2006 report titled "Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century," the Subcommittee on Commercial and Administrative Law of the United States House of Representatives' Committee on the Judiciary identified a number of questions related to rulemaking comments as areas of possible study by the Administrative Conference.[2] These questions include:

- Should there be a required, or at least recommended, minimum length for a comment period?
- Should agencies immediately make comments publicly available? Should they permit a "reply comment" period?
- Must agencies reply to all comments, even if they take no further action on a rule for years? Do comments eventually become sufficiently "stale" that they could not support a final rule without further comment?
- Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?

[1] 5 U.S.C. § 553; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (describing the "notice-and-comment procedures for rulemaking" under the APA as "probably the most significant innovation of the legislation").

[2] SUBCOMM. ON COMMERCIAL & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMIN. LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY at 3–5 (Comm. Print 2006).

- What effects do comments actually have on agency rules?

The Conference has studied these questions and other, related issues concerning the "comment" portion of the notice-and-comment rulemaking process. The Conference also has a concurrent recommendation that deals with separate matters, focusing specifically on legal issues implicated by the rise of e-rulemaking. *See* Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*.

The Conference believes that the comment process established by the APA is fundamentally sound. Nevertheless, certain innovations in the commenting process could allow that process to promote public participation and improve rulemaking outcomes more effectively. In this light, the Conference seeks to highlight a series of "best practices" designed to increase the opportunities for public participation and enhance the quality of information received in the commenting process. The Conference recognizes that different agencies have different approaches to rulemaking and therefore recommends that individual agencies decide whether and how to implement the best practices addressed.

In identifying these best practices, the Conference does not intend to suggest that it has exhausted the potential innovations in the commenting process. Individual agencies and the Conference itself should conduct further empirical analysis of notice-and-comment rulemaking, should study the effects of the proposed recommendations to the extent they are implemented, and should adjust and build upon the proposed processes as appropriate.

RECOMMENDATION

1. To promote optimal public participation and enhance the usefulness of public comments, the eRulemaking Project Management Office should consider publishing a document explaining what types of comments are most beneficial and listing best practices for parties submitting comments. Individual agencies may publish supplements to the common document describing the qualities of effective comments. Once developed, these documents should be made publicly available by posting on the agency website, Regulations.gov, and any other venue that will promote widespread availability of the information.

2. Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. As a general matter, for "[s]ignificant regulatory action[s]" as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.[3]

3. Agencies should adopt stated policies of posting public comments to the Internet within a specified period after submission. Agencies should post all electronically submitted comments on the Internet and should also scan and post all comments submitted in paper format.[4]

4. The eRulemaking Project Management Office and individual agencies should establish and publish policies regarding the submission of anonymous comments.

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[3] *See also* Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993) ("Congress should consider amending section 553 of the APA to . . . . [s]pecify a comment period of 'no fewer than 30 days.'"); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.").

[4] *See also* Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010) ("OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.").

5. Agencies should adopt and publish policies on late comments and should apply those policies consistently within each rulemaking. Agencies should determine whether or not they will accept late submissions in a given rulemaking and should announce the policy both in publicly accessible forums (*e.g.*, the agency's website, Regulations.gov) and in individual Federal Register notices including requests for comments. The agency may make clear that late comments are disfavored and will only be considered to the extent practicable.[5]

6. Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.[6]

7. Although agencies should not automatically deem rulemaking comments to have become stale after any fixed period of time, agencies should closely monitor their rulemaking dockets, and, where an agency believes the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale, consider the use of available mechanisms such as supplemental notices of proposed rulemaking to refresh the rulemaking record.

[5] *See, e.g.*, Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5,120, 5,121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking announcing that "[c]omments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable").

[6] *See also* Administrative Conference of the United States, Recommendation 76-3, *Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking* (1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto "present new and important issues or serious conflicts of data"); Administrative Conference of the United States, Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability* (1972) (recommending that agencies consider providing an "opportunity for parties to comment on each other's oral or written submissions); Office of Information & Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13,563, M-11-10, at 2 (Feb. 2, 2011) ("[Executive Order 13,563] seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.").

Administrative Conference Recommendation 2011-8

Agency Innovations in E-Rulemaking

Adopted December 9, 2011

The rulemaking function of federal regulatory agencies is typically accomplished today through "e-rulemaking": that is, through "'the use of digital technologies in the development and implementation of regulations,' before or during the informal rulemaking process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA)."[1] The website www.regulations.gov centralizes much e-rulemaking activity throughout the executive branch. This recommendation concerns individual agencies' uses of their own websites to promote e-rulemaking and other agency initiatives and activities.

The proliferation of competing demands for communication makes rulemaking only one of the many priorities under consideration when agency officials make decisions about the design and functionality of their websites. As a result, there is a risk agencies will make website design decisions without giving due consideration to enhancing public participation in rulemaking through the use of electronic media. Indeed, an emerging approach to government website design focuses on giving prominence to "top tasks" sought by members of the public. However, an exclusive focus on current website use or demand may push information about rulemaking, and online opportunities for public commenting on rulemaking, far into the background—simply because the volume of website traffic generated by online government services performed by many agencies dwarfs the traffic related to rulemaking. Rulemaking may never be a "top task" in terms of the numbers of Web users, but in a democracy, few tasks compare in significance with the

[1] Administrative Conference of the United States, Recommendation 2011-1, Legal Considerations in e-Rulemaking 1 (quoting Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process* 2 (2004) (working paper), http://lsr.nellco.org/upenn_wps/108).

ability of government agencies to create binding law backed up with the threat of civil, and even criminal, penalties.

The Conference studied the websites and e-rulemaking initiatives of 90 agencies, each of which had reported completing an average of two or more rulemakings during each six-month period covered by the semiannual Unified Regulatory Agenda in 2009-2010. The study reveals that individual agencies have used websites in innovative ways to promote e-rulemaking. For example, agencies have developed portions of their own websites to support rulemaking efforts. Some agencies have specialized webpages that allow users to submit and view comments on all of the agency's open rulemakings, or to view information on the status of their priority rulemakings. Links from some agency home pages make rulemaking information easy to locate. Other agencies have innovated by using social media to get the public involved in the rulemaking process from the earliest stages. These social media tools include blogs, Facebook, Twitter, IdeaScale, and other online discussion platforms.

Agency innovations can improve the availability of information and engage the public in rulemaking activities, often at no great cost to the government. A cost-effective technique to improve the availability of rulemaking information on individual agency websites leverages available centralized data sources. An example of this approach is found on the websites of many members of Congress, who provide a link on their home page to a page listing all the legislation the member sponsors. The list is not drawn from the Member's own database, but rather extracts information from a THOMAS database of all legislation currently pending in Congress. Regulations.gov makes a similar tool available to agencies, thus enabling them to provide easy access to complete and up-to-date rulemaking information without the necessity of maintaining the underlying database.

Agency innovations can also further well-established policies in favor of broadening access by groups that have historically faced barriers to participating effectively in rulemaking. In 2000, President Clinton issued Executive Order 13166 in an effort "to improve access to … programs and activities for persons who, as a result of national origin, are limited in their English

proficiency."[2] The Office of Management and Budget's policy on agency websites reminds agencies that they are "required to provide appropriate access for people with limited English proficiency."[3] Similarly, until high-speed Internet access is pervasive across all strata of society, any agency that makes full public access and participation a priority should explore low bandwidth options, while also remembering that some members of the public do not have Internet access at all. In addition, continued vigilance is needed to ensure that agency websites and other electronic media will be as accessible to individuals with disabilities as they are to other users. This accessibility may grow even more challenging in the wake of new techniques for organizing a large volume of information on a website.

Individual agency websites can also be used to address discrete deficiencies in the availability of critical rulemaking information. One such problem is that many agencies' policies relating to comments[4] cannot be found easily by the public. Even on Web pages dedicated to the submission of comments, a comment policy is not always visible to the user. A second difficulty arises with old rulemaking materials, which need to be preserved for archival, historical, and legal reasons, but are often difficult for users to find and search. A third issue is that agency websites are uniformly easy to locate, but do not always include features to ensure that essential information, particularly about rulemaking, is broadly accessible to the public.

The Conference believes that, as a general matter, agencies should continue to improve their websites to facilitate public accessibility and engagement so as to achieve the promise of e-rulemaking. This recommendation is intended to broadly encourage agencies to develop and use

[2] Exec. Order No. 13166, 65 Fed. Reg. 50121, 50121 (Aug. 11, 2000).

[3] OMB Deputy Director for Management Clay Johnson, Memorandum on Policies for Federal Agency Public Websites (Dec. 17, 2004), available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/-fy2005/m05-04.pdf.

[4] *See generally* Administrative Conference of the United States, Recommendation 2011-2, Rulemaking Comments (recommending that agencies establish and publish certain policies governing rulemaking comments).

innovative, cost-effective ways to use individual websites to solve some of the discrete problems identified above and generally engage the public in rulemaking.

RECOMMENDATION

Increasing the Visibility of Rulemakings

1. Agencies should design and manage their presence on the Web (including the Web as accessed by mobile devices) with rulemaking participation in mind.[5]

2. Each agency should provide access to a one-stop location, which should be easily reachable from its home page, for all of its pending rulemakings, highlighting those that are currently open for comment. This may take the form of providing pinpoint links to specific information about the agency's rulemakings available on websites such as Regulations.gov, RegInfo.gov, Federal Register 2.0, and so forth, which would allow the agency to efficiently enable the public to retrieve all available information the federal government has about its ongoing rulemakings.

3. Agencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemakings. When an agency sponsors a social media discussion of a rulemaking, it should provide clear notice as to whether and how it will use the discussion in the rulemaking proceeding.

Making Comment Policies Easy to Locate

4. Agencies should display or link to their comment policies in prominent or multiple locations on their websites.

[5] Throughout this recommendation, the term "rulemaking" includes, but is not limited to, the following proceedings, providing an agency is seeking or intends to seek public comment on them: planned rulemakings that have appeared in the Unified Agenda, rules at the advanced notice of proposed rulemaking stage, and proposed nonlegislative rules. The recommendation also extends to guidance documents on which an agency is seeking or intends to seek public comment.

Improving Access to Agency Websites

5. Agencies should continue to improve the accessibility of their websites to members of the public.

6. Agencies should take steps to improve access for persons who have faced barriers to effectively participating in rulemaking in the past, including non-English speakers, users of low-bandwidth Internet connections, and individuals with disabilities.

Ensuring Access to Materials from Completed Rulemakings

7. Agencies should develop systematic protocols to enable the online storage and retrieval of materials from completed rulemakings. Such protocols should, to the extent feasible, ensure that website visitors using out-of-date URLs are automatically redirected to the current location of the material sought.

Periodically Evaluating Agency Use of the Internet in Rulemaking

8. Agencies should periodically evaluate their use of the Internet in rulemaking and should continue to innovate and experiment with new and cost-effective ways to engage the public in rulemaking via the Internet.

Administrative Conference Recommendation 2013-4

The Administrative Record in Informal Rulemaking

Adopted June 14, 2013

The administrative record in informal rulemaking plays an essential role in informing the public of potential agency action and in improving the public's ability to understand and participate in agency decisionmaking. As well, the administrative record can be essential to judicial review of agency decisionmaking under the Administrative Procedure Act (APA), which directs courts to "review the whole record or those parts of it cited by a party" to determine whether challenged agency action is lawful.[1] This statutory language was originally understood as referring to formal proceedings. However, the Supreme Court has long interpreted this APA provision as also encompassing the "administrative record" in informal agency proceedings, whether reviewable by statute or as final agency actions under 5 U.S.C. § 704.[2] This application to informal proceedings has given rise to uncertainty and experimentation as agencies and courts have worked to implement the administrative record concept—at times inconsistently. As a result, confusion has arisen about the compilation and uses of agency rulemaking records maintained internally, public rulemaking dockets, and administrative records for judicial review. The differences among these three types of records can be seen from their descriptions below.

The Administrative Conference therefore commissioned a study of federal agencies' current practices in the development of rulemaking records, public rulemaking dockets, and administrative records for judicial review.[3] This recommendation and the supporting report

[1] 5 U.S.C. § 706.

[2] Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971).

[3] LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING (May 14, 2013) (report to the Administrative Conference of the United States) [hereinafter Beck

address these concepts in the context of informal agency rulemaking adopted pursuant to the notice-and-comment procedures prescribed in 5 U.S.C. § 553.[4] The recommendation does not address the record for agency decisions made in other contexts, such as in adjudication, formal rulemaking, or guidance documents.

This recommendation builds upon earlier Administrative Conference work in the areas of rulemaking, recordkeeping, and technological developments in managing records. Administrative Conference Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, identified the administrative materials that should be available to a court that was evaluating, on preenforcement review, the factual basis for agency rules of general applicability.[5] That recommendation was receptive to judicial development of the concept of a "record" on review of informal agency rulemakings. In Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, the Administrative Conference advised agencies to establish and manage rulemaking files "so that maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review."[6] A number of Administrative Conference recommendations also have examined the use of technology in acquiring, releasing, and managing agency records.[7] Most recently, the Conference examined

Report].

[4] 5 U.S.C. § 553(b)-(d). It may also have application to "hybrid" rulemaking statutes that require additional procedures beyond those in § 553 but less than those in formal rulemaking under 5 U.S.C. §§ 556-57.

[5] Administrative Conference of the United States, Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, 39 Fed. Reg. 23,044 (June 26, 1974), based on consultant's report published as Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

[6] Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994), *correction published*, 59 Fed. Reg. 8507 (Feb. 22, 1994).

[7] Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 90-5, *Federal Agency Electronic Records Management and Archives*, 55 Fed. Reg. 53,270 (Dec. 28, 1990); Administrative Conference of the United States, Recommendation 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*, 54 Fed. Reg. 5209 (Feb. 2, 1989).

legal considerations associated with the use of digital technologies in the development and implementation of informal rulemakings.[8]

This recommendation synthesizes and updates the Conference's prior recommendations in these areas. It is grounded in empirical research, supported by a survey questionnaire on present agency recordkeeping practices, as well as by a review of existing agency guidance.[9] The Conference has identified and recommends best practices for all rulemaking agencies in the areas of record compilation, preservation, and certification. The recommendation also advises agencies to develop guidance to aid agency personnel as they compile rulemaking and administrative records and public rulemaking dockets and to increase public understanding of agency recordkeeping.

Agencies engage in informal rulemaking with differing frequencies, resources, and technological capabilities. Many agencies are in a period of transition, as they move from paper to electronic recordkeeping.[10] Attention to the design of information technology resources that is mindful of the principles and best practices set forth below can aid agencies in recordkeeping, as well as facilitate greater public understanding of agency decisionmaking and more effective judicial review. For the purposes of this recommendation, the rulemaking record, public rulemaking docket, and the administrative record for judicial review are defined as follows:

"*Rulemaking record*" means the full record of materials before the agency in an informal rulemaking. The Conference contemplates that, in addition to materials required by law to be included in the rulemaking record, as well as all comments and materials submitted to the agency

[8] Recommendation 2011-1, *supra* note 7.

[9] *Beck Report*, *supra* note 3, at Section III.

[10] The Office of Management and Budget and the National Archives have directed federal agencies to manage all permanent electronic records in an electronic format to the fullest extent possible by December 31, 2019, and to develop plans to do so by December 31, 2013. Memorandum from Jeffrey D. Zients, Acting Director, Office of Management and Budget, and David S. Ferriero, Archivist of the United States, National Archives and Records Administration, to the Heads of Executive Departments and Agencies and Independent Agencies concerning "Managing Government Records Directive" M-12-18 (Aug. 24, 2012).

during comment periods, any material that the agency considered should be included as part of that record.

"*Considered*" entails review by an individual with substantive responsibilities in connection with the rulemaking.[11] To say that material was considered also entails some minimum degree of attention to the contents of a document. Thus, the rulemaking record need not encompass every document that rulemaking personnel encountered while rummaging through a file drawer, but it generally should include a document that an individual with substantive responsibilities reviewed in order to evaluate its possible significance for the rulemaking, unless the review disclosed that the document was not germane to the subject matter of the rulemaking. A document should not be excluded from the rulemaking record on the basis that the reviewer disagreed with the factual or other analysis in the document, or because the agency did not or will not rely on it. Although the concept resists precise definition, the term considered as used in this recommendation should be interpreted so as to fulfill its purpose of generating a body of materials by which the rule can be evaluated and to which the agency and others may refer in the future.

"*Public rulemaking docket*" means the public version of the rulemaking record managed by the agency, regardless of location, such as online at Regulations.gov or an agency website or available for physical review in a docket room. The public rulemaking docket includes all information that the agency has made available for public viewing. The Conference also urges agencies to manage their public rulemaking dockets to achieve maximum disclosure to the public. However, the Conference recognizes that prudential concerns may limit agencies from displaying some information, such as certain copyrighted or indecent materials, online. It is a best practice for agencies to describe and note online those materials that are not displayed but are available for

[11] The Conference first recommended inclusion of materials "considered" by the agency in the administrative record for judicial review in Recommendation 74-4, *supra* note 5. Courts have also relied on the concept of consideration in defining the administrative record. Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Engineers, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (citations omitted); s*ee also* Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs., 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Recommendation 74-4 in defining the administrative record); *cf.* Sierra Club v. Costle, 657 F.2d 298, 394 n. 469 (D.C. Cir. 1981) (discussing Recommendation 74-4 as an approach to defining the administrative record).

physical inspection. Another agency best practice is to include in the public rulemaking docket materials generated and considered by the agency after the close of the comment period but prior to issuance of the final rule.[12]

"*Administrative record for judicial review*" means the materials tendered by the agency and certified to a court as the record on review of the agency's regulatory action. The administrative record provided to the court will include an affidavit, made by a certifying official, attesting to the contents and accuracy of the record being certified.[13] It should also include an index itemizing the contents.[14] Parties often rely on this index in designating portions of the administrative record for judicial review, such as for inclusion in a joint appendix that will be presented to the court. The designated portions of the administrative record then typically serve as the basis for the court's review, as provided in the Administrative Procedure Act and as appropriate under the rules of the reviewing court.[15]

Some materials in an agency's rulemaking record may be protected from public disclosure by law or withheld from the public on the basis of agency privilege. For example, protected materials might include classified information, confidential supervisory or business information, or trade secrets. Other materials might be withheld on the basis of privilege, including attorney-client privilege, the attorney work product privilege, and the pre-decisional deliberative process privilege. Agency practices regarding the identification or inclusion of protected or privileged materials in administrative records and their accompanying indices vary.[16] Some agencies do not

[12] The present recommendation is not limited to disclosures that the APA, as construed in widely followed case law, may require. *See* Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984) ("[A]t least the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding . . . ."). However, this case law gives agencies an additional reason to provide public disclosure of factual material in some circumstances.

[13] *Beck Report*, *supra* note 3, at Section IV.A.

[14] *Id*.

[15] 5 U.S.C. § 706 (". . . the court shall review the whole record or those parts of it cited by a party. . . .").

[16] The variety of agency practices is described at length in the *Beck Report*, *supra* note 3, at Section IV.A.

include or identify deliberative or privileged materials in administrative records for judicial review.[17] Other agencies identify non-disclosed materials specifically in a privilege log provided with the index of the administrative record for judicial review. Agencies have also noted redactions of protected materials in the administrative record for judicial review and moved the court to permit filing of protected materials, or a summary thereof, under seal. Many agencies do not have a policy on inclusion of protected or privileged materials in an administrative record for judicial review and manage such materials on a case-by-case basis. Case-by-case consideration may occasionally be necessary, such as when privileged materials are referenced as the basis of the agency's decision. Nonetheless, the Conference recommends that agencies develop a written policy for treatment of protected or privileged materials, including indexing, in public rulemaking dockets and in certification of the administrative record for judicial review, and that agencies make this policy publicly available.

Compilation and preparation of the administrative record for judicial review is properly within the province of the agency and this process should be accorded a presumption of regularity by the reviewing court.[18] Completion or supplementation of the administrative record for judicial review may be appropriate where a strong showing has been made to overcome the presumption of regularity in compilation. For example, courts have permitted limited discovery on the basis of a "strong showing of bad faith or improper behavior" on the part of the agency decisionmaker.[19]

[17] Absent a showing of bad faith or improper behavior, the agency practice of excluding pre-decisional materials from the administrative record on judicial review enjoys substantial judicial support. *See In re Subpoena Duces Tecum* Served on Office of Comptroller of Currency, 156 F.3d 1279 (D.C. Cir. 1998); San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 789 F.2d 26, 44-45 (D. C. Cir. 1986) (en banc).

[18] *See* Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy, 485 F.3d 1091, 1097 (10th Cir. 1985) (". . . designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity.") (citation omitted); Amfac Resorts, LLC v. U.S. Dep't of Interior, 143 F.Supp. 2d 7, 12 (D.D.C. 2001); *see also* United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

[19] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

Courts may also inquire into allegations that the agency omitted information from the administrative record for judicial review that should have been included.[20]

Completion or supplementation of the administrative record for judicial review may also be appropriate in other circumstances not addressed in this recommendation. In a previous recommendation, the Conference has recognized that the reviewing court should not invariably be confined to the record on review in evaluating the factual basis of a generally applicable rule on preenforcement review.[21] The Conference has also acknowledged that, on direct review by courts of appeals, the record on review "can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court."[22]

RECOMMENDATION

Record Contents

1. *The Rulemaking Record.* In the absence of a specific statutory requirement to the contrary, the agency rulemaking record in an informal rulemaking proceeding should include:

(a) notices pertaining to the rulemaking;

(b) comments and other materials submitted to the agency related to the rulemaking;

(c) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking;

(d) reports or recommendations of any relevant advisory committees;

[20] *See, e.g.*, Cape Cod Hospital v. Sebelius, 630 F.3d 203, 211-12 (D.C. Cir. 2011); Ad Hoc Metals Coalition v. Whitman, 227 F. Supp. 2d 134, 139-40 (D.D.C. 2002).

[21] Recommendation 74-4, *supra* note 5.

[22] Administrative Conference of the United States, Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action* ¶ 5(a), 40 Fed. Reg. 27,926 (July 2, 1975).

(e) other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the rulemaking; and

(f) any other materials considered by the agency during the course of the rulemaking.

2. *The Public Rulemaking Docket.* Agencies should manage their public rulemaking dockets to achieve maximum public disclosure. Insofar as feasible, the public rulemaking docket should include all materials in the rulemaking record, subject to legal limitations on disclosure, any claims of privilege, or any exclusions allowed by law that the agency chooses to invoke. In addition, it may be prudent not to include some sensitive information online and to note instead that this material is available for physical review in a reading room.

3. *The Administrative Record for Judicial Review.* The administrative record provided to the court on judicial review of informal rulemaking should contain all of the materials in the rulemaking record as set forth in paragraph 1, except that agencies need not include materials protected from disclosure by law nor materials that the agency has determined are subject to withholding based on appropriate legal standards, including privilege.

Rulemaking Recordkeeping

4. Agencies should begin compiling rulemaking records no later than the date on which an agency publishes the notice of proposed rulemaking. Agencies should include materials considered in preparation of the notice of proposed rulemaking. For example, agencies should include materials received in response to an advance notice of proposed rulemaking or a notice of inquiry, if there is one, and considered in development of the proposed rule. The agency should continue compiling the rulemaking record as long as the rule is pending before the agency.

5. Agencies should designate one or more custodians for rulemaking recordkeeping, either on a rulemaking-by-rulemaking basis or generally. Agencies should inform agency personnel of the custodian(s) and direct them to deposit rulemaking record materials with the custodian(s), excepting if necessary confidential information to which access is restricted. The custodian(s) should document the record compilation process.

Public Rulemaking Dockets

6. To the extent practicable, agencies should index public rulemaking dockets for informal rulemaking, at an appropriate level of detail.

Record Preservation

7. The National Archives and Records Administration (NARA) should amend its agency guidance to address the official status and legal value of records relating to informal rulemaking, particularly administrative records for judicial review.

8. Agencies using electronic records management systems to manage rulemaking records, such as the Federal Document Management System or agency specific systems, should work with NARA to ensure the adequacy of such systems for recordkeeping purposes and the transfer to the National Archives of permanent records. Agencies should review their records schedules in light of developments in electronic records management.

Certification of Administrative Records for Judicial Review

9. Agencies should develop procedures for designating appropriate individuals, who may or may not be record custodians, to certify administrative records to the court in case of judicial review of agency action. Agency certifications should include an index of contents of the administrative record for judicial review.

Agency Record Policies and Guidance

10. Agencies should develop a general policy regarding treatment of protected or privileged materials, including indexing, in public rulemaking dockets and in certification of the administrative record for judicial review. Agencies should make this policy available to the public and should provide it to the Department of Justice, if the Department represents the agency in litigation.

11. Agencies that engage in informal rulemaking should issue guidance to aid personnel in implementing the above best practices. Agencies should make their guidance on informal rulemaking and administrative recordkeeping available to the public and should provide it to the Department of Justice, if the Department represents the agency in litigation. The level of detail and contents of such guidance will vary based on factors such as: the size of typical agency rulemaking records; institutional experience, or the lack thereof, with record compilation and informal rulemaking litigation; the need for consistency across agency components in the development and maintenance of rulemaking records; and agency resources. However, agencies should ensure that guidance addresses at least the following:

(a) essential components of the rulemaking record, public rulemaking docket, and the administrative record for judicial review;

(b) appropriate exclusions from the rulemaking record, including guidance on whether and when to exclude materials such as personal notes or draft documents;

(c) timing of compilation and indexing practices;

(d) management and segregation of privileged materials, e.g., attorney work product or pre-decisional deliberative materials;

(e) management and segregation of sensitive or protected materials, e.g., copyrighted, classified, protected personal, or confidential supervisory or business information;

(f) policies and procedures, if any, for the protection of sensitive information submitted by the public during the process of rulemaking or otherwise contained in the rulemaking record;

(g) preservation of rulemaking and administrative records and public rulemaking dockets;

(h) certification of the administrative record for judicial review, including the process for identifying the appropriate certifying official; and

(i) relevant capabilities and limitations of recordkeeping tools and technologies.

Judicial Review

12. A reviewing court should afford the administrative record for judicial review a presumption of regularity.

13. In appropriate circumstances, a reviewing court should permit or require supplementation or completion of the record on review. Supplementation or completion may be appropriate when the presumption of regularity has been rebutted, such as in cases where there is a strong showing that an agency has acted improperly or in bad faith or there are credible allegations that the administrative record for judicial review is incomplete.

Administrative Conference Recommendation 2013-5

Social Media in Rulemaking

Adopted December 5, 2013

In the last decade, the notice-and-comment rulemaking process has changed from a paper process to an electronic one. Many anticipated that this transition to "e-Rulemaking"[1] would precipitate a "revolution," making rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic. But these grand hopes have not yet been realized. Although notice-and-comment rulemaking is now conducted electronically, the process remains otherwise recognizable and has undergone no fundamental transformation.

At the same time, the Internet has continued to evolve, moving from static, text-based websites to dynamic multi-media platforms that facilitate more participatory, dialogic activities and support large amounts of user-generated content. These "social media" broadly include any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public. Examples of social media tools currently in widespread use include Facebook, Twitter, Ideascale, blogs, and various crowdsourcing[2] platforms. But technology evolves quickly, continuously, and unpredictably. It is a near certainty that the tools so familiar to us today will evolve or fade into obsolescence, while new tools emerge.[3]

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[1] The Conference has previously defined "e-Rulemaking" as "the use of digital technologies in the development and implementation of regulations before or during the informal process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA)." Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789, 48,789 (Aug. 9, 2011) (internal quotation marks and footnote omitted).

[2] "Crowdsourcing" is an umbrella term that includes various techniques for distributed problem-solving or production, drawing on the cumulative knowledge or labor of a large number of people. Wikipedia, the development of the Linux operating system, Amazon.com's "Mechanical Turk" platform, and public and private challenges that award a prize to the best solution to a particular problem are all examples of crowdsourcing.

[3] One type of emerging technology includes structured argumentation tools. These tools may take the form of, for example, interactive feedback forms that ask direct and progressively more focused questions in sequence or in response to input, thereby generating more targeted and substantively useful input from users.

The accessible, dynamic, and dialogic character of social media makes it a promising set of tools to fulfill the promise of e-Rulemaking. Thus, for example, the e-Rulemaking Program Management Office, which operates the federal government's primary online rulemaking portal, Regulations.gov, has urged agencies to "[e]xplore the use of the latest technologies, to the extent feasible and permitted by law, to engage the public in improving federal decision-making and help illustrate the impact of emerging Internet technologies on the federal regulatory process."[4] The Conference has similarly, albeit more modestly, recommended that "[a]gencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemakings."[5]

Federal agencies have embraced social media to serve a variety of non-rulemaking purposes,[6] but few have experimented with such tools in the rulemaking context. One explanation for this reluctance is uncertainty about how the Administrative Procedure Act (APA) and other requirements of administrative law apply to the use of social media, particularly during the process governed by the APA's informal rulemaking requirements, beginning when the Notice of Proposed Rulemaking (NPRM) has been issued, through the comment period, and until the agency issues a

[4] E-RULEMAKING PROGRAM MANAGEMENT OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (2010), available at http://exchange.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf.

[5] Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2257, 2265 (Jan. 17, 2012). The Conference has consistently supported full and effective public participation in rulemaking, as well as the use of new technologies to enhance such participation. In Recommendation 95-3, *Review of Existing Agency Regulations*, the Conference encouraged agencies to "provide adequate opportunity for public involvement in both the priority-setting and review processes," including by "requesting comments through electronic bulletin boards or other means of electronic communication." 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

[6] For example, agencies have enthusiastically embraced social media, including Facebook and Twitter, as an effective tool for pushing information out to the public, from general information about an agency and its mission to more specific notifications of services, benefits, or employment opportunities that are available from an agency. Agencies have also used social media in more interactive ways, such as when nearly three dozen agencies used Ideascale to engage the public in the process of developing the agencies' Open Government Plans, or to collect metadata, such as when the Consumer Financial Protection Bureau used "heat maps" generated from click-based online user reviews of prototype disclosure forms to illustrate which sections of the forms elicited the strongest reactions.

final rule.[7] In particular, agencies are uncertain whether public contributions to a blog or Facebook discussion are "comments" for purposes of the APA, thus triggering the agencies' obligations to review and respond to the contributions and include them in the rulemaking record. Other concerns include how the Paperwork Reduction Act applies to agency inquiries through social media,[8] whether the First Amendment might limit an agency from moderating a social media discussion, and how individual agencies' "ex parte" communications policies might apply to the use of social media.

Apart from legal concerns are doubts as to whether, when, and how social media will benefit rulemaking. These doubts arise with respect to two distinct issues that often overlap. First, can social media be used to generate more useful public input in rulemaking? Second, is increased lay participation in rulemaking likely to be valuable? Experience suggests that both the quality of comments and the level of participation in social media discussions are often much lower than one might hope. A third-party facilitator may be able to help an agency address these issues by encouraging public participation, helping participants understand the rulemaking process and the agency's proposal, asking follow-up questions to produce more substantive input, and actively facilitating engagement among participants. Regardless of whether a third-party facilitator is used, however, creating the conditions necessary to foster a meaningful, productive dialogue among participants requires commitment, time, and thoughtful design. Since this kind of innovation can be costly, agencies are understandably reluctant to expend scarce resources in pursuit of uncertain benefits. Agencies also face a variety of practical questions. One such question is whether to require participants to identify themselves in agency-sponsored social media discussions. Another concern is that the use of ranking or voting tools may mislead some to believe that rulemaking is a plebiscite or allow some participants to improperly manipulate the discussion.

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[7] The Conference recently addressed legal issues related to e-rulemaking in Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, *see supra* note 1, but did not delve into the unique concerns that arise when agencies use social media to support rulemaking activities.

[8] The Office of Management and Budget has issued helpful guidance on these issues. *See* Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Independent Regulatory Agencies regarding Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

Social media can be valuable during the notice-and-comment phase of rulemaking, but on a selected basis. For example, if an agency needs to reach an elusive audience or determine public preferences or reactions in order to develop an effective regulation, social media may enable the collection of information and data that are rarely reflected in traditional rulemaking comments. Success requires an agency to thoughtfully identify the purpose(s) of using social media, carefully select the appropriate social media tool(s), and integrate those tools into the traditional notice-and-comment process. In addition, agencies must clearly communicate to the public how the social media discussion will be used in the rulemaking. Although the APA allows agencies the flexibility to be innovative, attention should be given to how the APA or other legal requirements will apply in the circumstances of a particular rulemaking.

Agencies may find, however, that it is both easier and more often valuable to use social media in connection with rulemaking activities, but outside the notice-and-comment process. For example, social media can be effective for public outreach, helping to increase public awareness of agency activities, including opportunities to contribute to policy setting, rule development, or the evaluation of existing regulatory regimes. The use of social media may also be particularly appropriate during the pre-rulemaking or policy-development phase. Here, the APA and other legal restrictions do not apply, and agencies are often seeking dispersed knowledge or answers to more open-ended questions that lend themselves to productive discussion through social media. For the same reasons, social media may be an effective way for agencies to seek input on retrospective review of existing regulations. It also may be helpful in connection with a negotiated rulemaking,[9] where these tools may make it easier for the diverse interests to collaborate during and between meetings on a solution to the problem being addressed.

This recommendation provides guidance to agencies on whether, how, and when social media might be used both lawfully and effectively to support rulemaking activities. It seeks to identify broad principles susceptible of application to any social media tool that is now available or may be developed in the future. It is intended to encourage innovation and facilitate the

[9] *See, e.g.*, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations* (Dec. 13, 1985).

experimentation necessary to develop the most effective techniques for leveraging the strengths of social media to achieve the promises of e-Rulemaking.

RECOMMENDATION

1. Agencies should explore in the rulemaking process the use of social media—online platforms that can provide broad opportunities for public consultation, discussion, and engagement.

Public Outreach

2. Agencies should use social media to inform and educate the public about agency activities, their rulemaking process in general, and specific rulemakings. Agencies should take an expansive approach to alerting potential participants to upcoming rulemakings by posting to the agency website and sending notifications through multiple social media channels. Social media may provide an effective means to reach interested persons who have traditionally been underrepresented in the rulemaking process (including holders of affected interests that are highly diffused).

3. Agencies should recognize that raising awareness among missing stakeholders (those directly affected by the proposed rule who are historically unlikely to participate in the traditional comment process) and other potential new participants in the rulemaking process will require new outreach strategies beyond simply giving notice in the *Federal Register*, Regulations.gov, and the agency website. Social media may be particularly effective for successful outreach, and agencies using it for this purpose in connection with rulemaking should consider:

(a) Developing one or more communications plans specifically tailored to the rule and to all types of missing stakeholders or other potential new participants the agency is trying to engage. These plans should be evenhanded and designed to encourage all types of stakeholders to participate.

(b) In outreach messages, clearly explaining the mechanisms through which members of the public can participate in the rulemaking, what the role of public comments is, and how the agency will take comments into account.

(c) Encouraging public response by being clear and specific about how the proposed rule would affect the targeted participants and what input will be most useful to the agency.

(d) Asking all interested organizations to spread the participation message to members or followers. Agencies should be prepared to explain why individual participation can be beneficial, and to encourage organizations to solicit substantive, individualized comments from their members.

(e) Using multilingual social media outlets where appropriate.

4. The General Services Administration, the e-Rulemaking Program Management Office, and other federal agencies, either individually or (preferably) collaboratively, should use social media to create and distribute more robust educational programs about rulemaking. These efforts could include: producing videos about the rulemaking process and how to effectively participate through commenting and posting on an agency website or video-sharing website; hosting webinars in which agency personnel discuss how to draft useful and helpful comments; maintaining an online database of exemplary rulemaking comments; or conducting an online class or webinar or providing explanatory materials in which officials review a draft comment and suggest ways to improve it.

5. Agencies should explore ways to publicize, and allow members of the public to receive, regular, automated updates on developments in, at a minimum, significant rulemakings.

6. Agencies should consider using social media prior to the publication of an NPRM or proposed policy where the goal is to understand the current state of affairs, collect dispersed knowledge, or identify problems. To enhance the amount and value of public input, an agency seeking to engage the public for these purposes should, to the maximum extent possible, make clear the sort of information it is seeking and how the agency intends to use public input received in this way. The agency should also directly engage with participants by acknowledging submissions, asking follow-up questions, and providing substantive responses.

7. Agencies should consider using social media in support of retrospective review of existing regulations, particularly to learn what actual experience has been under the relevant regulation(s).

Using Social Media in Notice-and-Comment Rulemaking

8. Although the use of social media may not be appropriate and productive in all rulemakings, agencies may use social media to supplement or improve the traditional commenting process. Before using social media in connection with a particular rulemaking, agencies should identify the specific goals they expect to achieve through the use of social media and carefully consider the potential costs and benefits.

9. Agencies should use the social media tools that best fit their particular purposes and goals and should carefully consider how to effectively integrate those tools into the traditional rulemaking process.

Effective Approaches for Using Social Media in Rulemaking

10. For each rulemaking, agencies should consider maintaining a blog or other appropriate social media site dedicated to that rulemaking for purposes of providing information, updates, and clarifications regarding the scope and progress of the rulemaking. Agencies may also wish to explore using such a site to generate a dialogue.

11. When an agency sponsors a social media discussion in connection with a notice-and-comment rulemaking, it should determine and prominently indicate to the public how the discussion will be treated under the APA (for administrative record purposes). The agency may decide, for example:

(a) To include all comments submitted via an agency-administered social media discussion in the rulemaking record. Agencies should consider using an application programming interface (API) or other appropriate technological tool to efficiently transfer content from social media to the rulemaking record.

(b) That no part of the social media discussion will be included in the rulemaking docket, that the agency will not consider the discussion in developing the rule, and that the agency will not respond to the discussion. An agency that selects this option should communicate the restriction clearly to the public through conspicuous disclaimers on the social media site itself, provide instructions on how to submit an official comment to the rulemaking docket, and provide a convenient mechanism for doing so. It is especially

important in these circumstances that the agency clearly explain the purpose of a social media discussion the agency does not intend to consider in the rulemaking.

12. When soliciting input through a social media platform, agencies should provide a version of the NPRM that is "friendly" and clear to lay users. This involves, for example, breaking preambles into smaller components by subject, summarizing those components in plain language, layering more complete versions of the preamble below the summaries, and providing hyperlinked definitions of key terms. In doing this, the agency should either:

(a) Publish both versions of the NPRM in the *Federal Register*; or

(b) Cross-reference the user-friendly version of the NPRM in the published NPRM and cross-reference the published NPRM in the user-friendly version of the NPRM.

13. Agencies should consider, in appropriate rulemakings, retaining facilitator services to manage rulemaking discussions conducted through social media. Appropriate rulemakings may include those in which:

(a) Targeted users are inexperienced commenters who may need help to prepare an effective comment (e.g., providing comments that give reasons rather than just reactions); or

(b) The issues will predictably produce sharply divided or highly emotional reactions.

14. Agencies should realize that not all rulemakings will be enhanced by a crowdsourcing approach. However, when the issue to be addressed is the public or user response itself (e.g., when the agency seeks to determine the best format for a consumer notice), direct submission to the public at large may lead to useful information. In addition, agencies should consider encouraging, and being receptive to, comments from lay stakeholders with "situated knowledge" arising out of their real world experience.

15. Agencies should consider experimenting with collaborative drafting platforms, both internally and, potentially, externally, for purposes of producing regulatory documents.

16. If an agency chooses to use voting or ranking tools, the agency should explain to the public how it intends to use the input generated through those tools (e.g., to help it decide which of several potential forms is easiest to use).

17. Agencies should use social media to notify and educate the public about the final agency action produced through a rulemaking.

18. In appropriate circumstances, agencies should also use social media to provide compliance information. For example, an agency might use social media to inform and educate the public about paperwork requirements associated with a rule or the availability of regulatory guidance.

19. Agencies should collaborate to identify best practices for addressing issues that arise in connection with the use of social media in rulemaking.

Direct Final Rulemaking

20. Agencies should consider using social media before or in connection with direct final rulemaking to quickly identify whether there are significant or meaningful objections that are not initially apparent.

Key Legal Considerations

21. Agencies have maximum flexibility under the APA to use social media before an NPRM is issued or after a final rule has been promulgated.

22. Agencies should consider how the First Amendment applies to facilitating or hosting social media discussions, such as by making it clear through a posted comment policy that all discussions and comments on any given agency social media site will be moderated in a uniform, viewpoint-neutral manner. Through this posted policy, agencies may decide to define or restrict the topics of discussion, impose reasonable limitations to preserve decorum, decency, and prevent spam or, alternatively, terminate a social media discussion altogether.

23. Agencies that have “ex parte” contact policies for information obtained in connection with rulemaking should review those policies to ensure they address communications made through social media.

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